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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of  
MARTHA J. HUBER, et al.

For Construction Permit for a  
New FM Station on Channel 234A  
in New Albany, Indiana

)  
) MM Docket No. 93-51

)  
) File Nos. BPH-911114ME,  
) et al.

TO: Honorable Richard L. Sippel  
Administrative Law Judge

**CONSOLIDATED OPPOSITION TO MOTIONS  
TO ENLARGE ISSUES**

Martha J. Huber (Huber), by her attorneys, now opposes the "First Motion of Midamerica to Enlarge Issues Against Martha J. Huber" and the "Motion to Enlarge Issues" filed by Rita Reyna Brent (Brent). Both pleadings were filed on April 26, 1993. Since both motions attack Huber's financial qualifications and make similar arguments, Huber will respond to the two motions in a consolidated pleading.

Midamerica and Brent both seek the specification of a financial qualifications issue against Huber because the bank letter from Citizens Fidelity Bank of Indiana (now PNC Bank of Indiana, Inc.) is allegedly an accommodation letter that does not provide the required reasonable assurance that funds will be available. Midamerica also seeks a false certification issue. The motions substitute speculation and surmise for

Midamerica and Brent bore the burden of making a prima facie case that Huber's bank letter was a meaningless "accommodation" letter. Priscilla L. Schwier, 4 FCC Rcd 2659, 2660, 66 RR 2d 727, 729 (1989). Unless the petitioners meet that burden, Huber is under no obligation to provide evidence in opposition. Speculations concerning a bank letter do not meet the requirement of Section 1.229(d) of the Commission's rules for "specific allegations of fact sufficient to support the action requested." Id. In this case, Midamerica and Brent had every opportunity to obtain evidence from Citizens Fidelity bank that the bank had no bona fide intention of making the loan. They did not do so. Instead, they seek issues based upon their unsupported, distorted interpretation of the bank letter. Their motions are facially deficient because they are not based upon competent evidence, and that failure, standing alone, requires denial of their petitions.

In any event, Huber's bank letter is not an accommodation letter. In order to have reasonable assurance that funds would be available, a binding contractual commitment is not required. Multi-State Communications, Inc. v. FCC, 590 F.2d 1117, 44 RR 2d 487 (D.C. Cir. 1978). Instead, "a present firm intention to make a loan, future conditions permitting, is the essence of our 'reasonable assurance' standard." Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980). Attachment 1 to this opposition is a letter from Leo Tierney, the Senior Vice President of the bank, and the author of the

original bank letter.<sup>1</sup> Mr. Tierney conclusively confirms that Citizens Fidelity provided Huber with the required assurance.

Mr. Tierney writes:

The purpose of my October 29, 1991 letter was to provide you with assurance of our intention to make the requested loan at the time your application is granted.

He also writes, "we provided you with assurance that financing would be available, and you still have that assurance." Citizens Fidelity clearly has always had the intention to loan Huber \$350,000, and the bank letter complies with the reasonable assurance standard. The unsupported claim that "the letter is merely an expression of the bank's interest in possibly making a loan at some time in the future" (Midamerica Motion, P. 3, see also Brent Motion, P. 3) is just plain wrong.

Both Midamerica and Brent argue that the letter is somehow deficient because the face of the letter does not recite that the bank has reviewed Huber's qualifications. Midamerica Motion, P. 5, Brent Motion, P. 5. No authority exists for the proposition that a bank letter must recite on the face of the document that an individual's qualifications have been reviewed. Midamerica and Brent had the burden of establishing that the bank did not review Huber's

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<sup>1</sup> As noted in Mr. Tierney's letter, the name of the bank was Citizens Fidelity Bank, Indiana when the original letter was written, and the name is now PNC Bank, Indiana, Inc. For the sake of consistency, the bank will be referred to as Citizens Fidelity

qualifications, and they did not meet that burden. The requirement that a bank review an applicant's qualifications is met if "the bank has a long and established relationship with the borrower..." Scioto Broadcasters, 5 FCC Rcd 5158, 5160, 68 RR 2d 195, 199 (Rev. Bd. 1990), see also Midamerica Motion P. 3. Huber has been a customer of Citizens Fidelity for over twenty-five years, which certainly constitutes a "long and established relationship" under the Scioto test. See Attachment 1.<sup>2</sup> Mr. Tiernev states that the bank was "well

the future." Midamerica Motion, P. 3. That claim is contradicted not only by Mr. Tierney's statement but also by the letter itself, which states that the bank "would be interested in loaning up to \$350,000..." The letter uses the unconditional phrase "would be interested" instead of "might be interested" or "would possibly be interested". The movants' arguments are worse than unfounded speculation: they are directly contrary to all available evidence.

Neither Midamerica nor Brent cites any case for the proposition that the words "would be interested in loaning" makes a bank letter a meaningless accommodation. Indeed, the Commission has found a bank letter acceptable when the letter stated that it "agrees to consider" a loan. Poet's Seat Broadcasting, Inc., 78 FCC 2d 1080, 1088, 47 RR 2d 1265, 1271 (1980). The language accepted in Poet's Seat was far more conditional than the language used by Citizens Fidelity here. Reasonable assurance is a matter of substance, not magic words. Huber's bank letter has the necessary substance.

The movants' other attacks on the letter are equally off-base. For instance, Midamerica and Brent both argue that the repayment period of "as long as two to five years" is fatally uncertain. Midamerica Motion, P. 4, Brent Motion, P. 4. In Salt City Communications, Inc., 7 FCC Rcd 4221, 4226, 71 RR 2d 192, 198 (Rev. Bd. 1992), affirmed in pertinent part 8 FCC Rcd 683 (1993), the Board noted, "The absence of a particular basic term is not necessarily fatal if other key provisions

are specified and the overall circumstances demonstrate that reasonable assurance is present." The first case cited in support of that proposition is A.P. Walter, Jr., 6 FCC Rcd 875, 877-878, 68 RR 2d 1460, 1464 (Rev. Bd. 1991), where a bank letter was found acceptable although it contained no express repayment terms. The Citizens Fidelity letter, of course, contains repayment terms. As Mr. Tierney states, there is nothing mysterious about this term: the minimum period will be two years, and the maximum period is five

Brent wants.<sup>3</sup> As for Brent's sheer speculation that Huber did not or could not consider interest on the loan in her budget, a declaration from Huber (submitted as Attachment 2 to this Opposition) demonstrates that her construction and operation budget made more than adequate provision for interest.

Midamerica argues that minor differences between a sample provided by counsel and the Citizens Fidelity letter demonstrate that the letter is an accommodation. Midamerica Motion, Pp. 5-6. It is meaningless that the bank "did not adopt wholesale the specific language provided by" counsel. Harrison County Broadcasting Co., 6 FCC Rcd 5819, 5822, 70 RR 2d 40, 44 (Rev. Bd. 1991). Midamerica states that the bank "presumably" did not give much thought to the matter. Midamerica Motion, P. 5. That statement is nothing more than rank speculation.

Finally, Midamerica engages in faulty and misguided speculation as to why no bank would make the contemplated loan. Midamerica Motion, Pp. 4-5. "It is not [the Commission's] practice to second-guess the bank's lending judgment." Liberty Productions, a Limited Partnership, 7 FCC Rcd 7581, 7584, 71 RR 2d 1101, 1105 (1992). Midamerica's "analysis" ignores the obvious. Midamerica's apparent thesis is that because no "personal guarantees" are required, a bank

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<sup>3</sup> Brent incorrectly describes the bank letter when she claims "that interest will be deferred during the first year..." As is obvious from reading the letter, principal payments will be deferred in the first year.

would only lend up to the amount of the physical assets. Huber is not the "typical corporate or partnership borrower" that Midamerica is discussing. She is an individual who will be personally liable for any loan she takes out in her own name. Since Citizens Fidelity was thoroughly familiar with her financial condition, that condition provided a more than adequate basis upon which to make its decision.

In short, Midamerica and Brent have substituted speculation and distortions for competent evidence. The original bank letter and Mr. Tierney's latest letter both demonstrate that Huber has always had reasonable assurance that funds would be available from Citizens Fidelity. Midamerica's request for a false financial certification issue is even more frivolous than its request for a financial qualifications issue because it has offered no evidence of an intent to deceive the Commission.

Accordingly, Huber asks the Presiding Judge to deny the "First Motion of Midamerica to Enlarge Issues Against Martha J. Huber" and Brent's "Motion to Enlarge Issues".<sup>4</sup>

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<sup>4</sup> Midamerica's motion to Enlarge Issues Against Martha J. Huber.



Respectfully submitted,

MARTHA J. HUBER

By Morton L. Berfield  
Morton L. Berfield

By John J. Schauble  
John J. Schauble

Cohen and Berfield. P.C.

May 5, 1993

**PNCBANK**

**Martha J. Huber  
1927 Plum Hill Way  
Floyds Knobs, Indiana 47119**

**Dear Ms. Huber:**

**This letter will amplify upon my letter of October 29, 1991, in which our bank provided you with assurance of our intention to loan you up to \$350,000 to construct and to operate your proposed FM broadcast station in New Albany, Indiana.**

**First, this will confirm that you have been a customer of this bank for over twenty five years, and this bank was well aware of your financial condition in October 1991 and remains familiar with your financial condition today.**

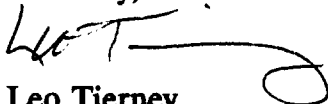
**The purpose of my October 29, 1991 letter was to provide you with assurance of our intention to make the requested loan at the time your application is granted. As stated in the letter, the letter was not a contractually binding commitment, and no such commitment was made. However, based upon the bank's knowledge of your financial condition, we provided you with assurance that financing would be available, and you still have that assurance.**

**As noted in the letter, the interest on the loan would be one percent (a percent increment) above the bank's prime rate, subject to change from time to time. The bank's present prime rate is 6.00% and in October 1991, the bank's prime rate was 8.00%.**

**When I wrote that the loan "would be for a period as long as two to five years" I meant that a loan period of a minimum of two years and a maximum of five years would be acceptable to the bank. The exact term of the loan will be decided when the loan is made.**

**In short, the letter I wrote on October 29, 1991 remains valid and in effect, subject to the conditions contained in that letter.**

**Sincerely,**



**Leo Tierney  
Senior Vice President  
PNC Bank, Indiana, Inc.  
(Formerly Citizens Fidelity  
Bank, Indiana)**

ATTACHMENT 2

DECLARATION

Martha J. Huber, under penalty of perjury, declares that the following is true and correct to the best of her knowledge:

I am an individual applicant for a construction permit for a new FM station at New Albany, Indiana (File No. BPH-911114ME).

When I signed my application on November 13, 1991, I certified that sufficient funds were available for me to construct and to operate, for three months, my proposed station. My basis for that certification was a bank letter from Citizens Fidelity Bank and Trust Company Indiana (now PNC Bank, Indiana, Inc.).

At the time I signed my application, a budget had been prepared detailing the costs involved in constructing my station and operating it for three months without revenue. That budget took into account the fact that interest would have to be paid after the loan was taken down. The interest rate used in calculating the interest expense was ten percent. As noted in Mr. Tierney's May 5, 1993 letter, if the loan had been made in October 1991, the interest rate would have been

CERTIFICATE OF SERVICE

I, Linda Gibson, do hereby certify that on the 11th day of May 1993, a copy of the foregoing "Consolidated Opposition To Motions To Enlarge Issues" was sent first-class mail, postage prepaid to the following:

James Shook, Esq.\*  
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Linda Gibson

\* Hand Delivered